Office - Supreme Court, U. S.
FILED
MAY 13 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942

No. 1023

BENJAMIN MALTZ, AN INDIVIDUAL DOING BUSINESS AS EXCEL MANUFACTURING COMPANY,
Petitioner,

vs.

GEORGE D. SAX, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MYER N. ROSENGARD,
Counsel for Petitioner.

PRINTED BY CHICAGO LAW PRINTING CO.

INDEX.

	PAGE
PETITION	1
Summary statement of the matters involved	2
Questions presented	2-4
Reasons for the allowance of the writ	5
Conclusion	6
BRIEF IN SUPPORT OF PETITION	7-15
Opinions below	7
Jurisdiction	7
Specification of errors	8
SUMMARY OF ARGUMENT:	
A. The Circuit Court of Appeals has refused to accept the admonitions of this court and has declared a public policy of the United States which imposes sanctions upon plaintiffs bringing civil proceedings for treble damages under the Sherman Anti-Trust Act, contrary to a proper interpretation of the legislative intent	9
B. The Circuit Court of Appeals has declared it to be the common law public policy of the United States that gambling per se is against such a national policy, and, therefore, that the manufacture, sale and distribution of such devices are contrary to public policy. There is no common law public policy of the United States making unlawful the manufacture and distribution of gambling devices. The pronouncement of the Court of Appeals represents judicial fiat and defies basic constitutional precepts	11
C. The parties to this cause are not in *particeps criminis,* nor does the plaintiff come into court with "unclean hands."	14

PAGE

CASES AND AUTHORITIES CITED.

Apex Hosiery Co. v. Leader, 310 U. S. 485 9
DaCosta v. Jones (1778) 2 Cowp. 728 12
Dietrick v. Greaney, 309 U. S. 190 10
D'Oench Duhme & Co. v. F.D.I.C., 315 U. S. 447 10
Exparte Wilson, 114 U. S. 417 12
Federal Trade Comm'n. v. Keppel Bros., 291 U. S. 304 13
Frost v. Mines Corp., 312 U. S. 38 10
Gilbert v. Sykes (1812) 16 East 150 12
Gillman v. Stern, 114 Fed. (2d) 28 15
Hinderlider v. LaPlata Co., 304 U. S. 92 10
Hodgson v. Temple (1913) 5 Taunt 181 12
Keystone Co. v. Excavator Co., 290 U. S. 240 ..... 6, 8, 15
Maddox v. United States, 156 U. S. 237 12
Morgan v. Pettit, 4 Ill. 529 12
People v. Monroe, 349 Ill. 270 13
Roseland v. Phister Mfg. Co., 125 Fed. (2d) 417 ..... 4, 6
Smith v. Alabama, 124 U. S. 465 12
Smith v. Aiery (1704) 6 Mod. 128 12
Standard Oil Co. v. United States, 221 U. S. 1 12
Tigner v. Texas, 310 U. S. 141 11
United States v. Cooper Corp., 312 U. S. 600 11
United States v. Socony Vacuum Oil Co., 310 U. S. 213 9
Woerter, Rec'r. v. Lamson, 380 Ill. 35 13

STATUTES CITED.

Secs. 1 and 15, Title 15, U.S.C. (Sherman Anti-Trust Act) 1, 9
Sec. 347, Title 28, U.S.C. (Sec. 240, Judicial Code) 7
Vol. 8, Compiled Statutes of England, 1104 12

OTHER AUTHORITIES CITED.

Vol. 22, Opinions of the Attorney General of the United States, p. 196 10
Vol. 25, English and Empire Digest, 396 12
Common Law and our Federal Jurisprudence, 74 Univ. of Pa. Law Rev., 270 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942

No.

BENJAMIN MALTZ, AN INDIVIDUAL DOING BUSINESS AS EXCEL MANUFACTURING COMPANY,

Petitioner,

vs.

GEORGE D. SAX, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Judges of the Supreme Court of the United States:

Now comes the petitioner, Benjamin Maltz, individually doing business under the trade name of Excel Manufacturing Company and respectfully petitions this Honorable Court to grant a Writ of Certiorari to the United States Circuit Court of Appeals, for the Seventh Circuit, and to bring to this Honorable Court, for review, the record and proceedings had and taken in said United States Circuit Court of Appeals, for the Seventh Circuit.

I.

Summary Statement of Matters Involved.

The record here poses the following question:

> Is there a common law public policy of the United States which *per se* makes the manufacture, sale and distribution of gambling devices unlawful; and which compels the courts of the United States to refuse to entertain an action brought by a manufacturer of such devices against competitors, for treble damages under the Sherman Anti-Trust Act?

It is conceded that the case involves solely an issue of public policy of the United States distinguished from State policy; that neither the Sherman Anti-Trust nor any other legislative enactment of Congress declares that the manufacture, sale and distribution of gambling devices are unlawful. It was neither asserted nor did the trial court or reviewing court consider that a decision in the case involves the lottery statutes of the United States, or any application of these statutes. The question therefore involves solely one of common law public policy of the United States distinguished from what might be the policy of the State of Illinois or any other State. The Sherman Anti-Trust Act itself does not impose the sanctions which were imposed by the trial court and the Circuit Court of Appeals.

The cause is a proceeding brought in the District Court, for the Northern District of Illinois, for the recovery of treble damages under the Sherman Anti-Trust Act (Title 15, U.S.C., Secs. 1 and 15). In his complaint the plaintiff asserted that he and all of the defendants are competitors, engaged in the manufacture and sale and distribution, in interstate commerce, of what he termed "sales boards"; that the defendants control in excess of 65% of the total

volume of sales of the product in the United States (Rec. p. 4). He charged that the defendants, some years prior to his coming into the business and entering the field of competition, had banded themselves together into an association (without name and without public or avowed purpose) for the actual purpose of controlling the price to be paid by the wholesalers and distributors throughout the United States (Rec. pp. 5-7). Shortly prior to the filing of the complaint the defendants, by concerted and agreed action, decided to put the plaintiff out of business and to stifle his competition. The following took place: Defendants set up a dummy sales organization which they called "Standard Board Company." This dummy company proceeded to offer to the trade (and through salesman employed by the defendants themselves) items similar to the ones manufactured by the plaintiff at a price below cost to the plaintiff, as well as below cost to the defendants (Rec. pp. 8-10). Such a program had previously been adopted by the defendants as to other competitors. The result was that the plaintiff lost a large number of orders which had previously been placed, and plaintiff found himself with a large quantity of manufactured product and raw materials on his hands which he could not sell. He charges that he suffered damage (detailed in the complaint, Rec. p. 10) in the sum of $15,000.00.

Defendants confessed these factual assertions by filing a motion to strike the complaint and to dismiss the action. The only specification of objection made by them in their attack upon the complaint was that the plaintiff was engaged in the manufacture of a gambling device, viz., "punch boards," and they urged that such a business was contrary to the public policy of the United States; that, therefore, the plaintiff had no standing in the courts of the United States and his action should be summarily dismissed (Rec. p. 12).

The trial court (without opinion) sustained the motion and dismissed the complaint (Rec. p. 17). On appeal to the Circuit Court of Appeals for the Seventh Circuit, that court affirmed the dismissal order (Rec. p. 38), in an opinion written by Judge Evan Evans. That court stated that both the plaintiff and the defendants were engaged in an unlawful business and were in *particeps criminis;* or that the plaintiff came into court with unclean hands and should not be permitted to maintain this suit (Rec. p. 34). This conclusion was based upon the premise or assumption that the plaintiff was engaged in a business, to-wit: the manufacture, sale and distribution of a gambling device, against the public policy of the United States. Having made this assumption, the court then proceeded to argue that the plaintiff and the defendantsc were in *particeps criminis,* etc. Such assumption or premise was made without the citation of other authority and appears in the opinion in the following language (Rec. p. 34):

> "Our question is whether one engaged in the business of making and selling gambling devices, *the use of which is against public policy and unlawful,* may recover damages under the Sherman Anti-Trust Act for a 'violation of his legal right' * * * (Italics ours).

The foregoing decision and opinion of the Circuit Court of Appeals, in principle, is contrary to a decision and opinion of that court (filed February 5, 1942) in the case of *Roseland* v. *Phister Mfg. Co.,* 125 Fed. (2d) p. 417. In the cited case that court said, "it is the source of injury not the character of property or business injured which constitutes the test of recovery."

In the case at bar, the Court of Appeals disregarded the question of the source of injury but imposed sanctions upon the plaintiff.

As a result of this pronouncement in the instant case, it certainly follows that if put to the test the Court of Appeals would be compelled to hold that all persons, suppliers of raw materials, common carriers, etc., are compelled to deal with people engaged in this business with caution, and that those dealing with persons engaged in this business, knowing that they are manufacturing the particular gambling device, have no standing and cannot maintain civil actions in the Courts of the United States, either on the basis of being in *particeps criminis* with them, or run the risk of being declared to come into the courts of the United States with unclean hands. Such doctrine is far reaching when it it considered that all but two of the respondents maintain their plants and principal places of business in the Seventh Circuit, to-wit: in the City of Chicago (Rec. p. 4). These four defendants manufacture and distribute by far and large the major part of this product throughout the United States.

II.

The Reasons for the Allowance of the Writ.

Petitioner respectfully submits to this Court that he is entitled to be heard in this Court for the following reasons:

(a) Because the Circuit Court of Appeals assumed the existence of a public policy of the United States which does not exist, to-wit: that the manufacture, sale and distribution of gambling devices are unlawful and against such public policy;

(b) Because the Circuit Court of Appeals, for the Seventh Circuit, by assuming the existence of a public policy, in truth itself declared such public policy; that such a declaration of policy by a court of the United States defies the constitutional division of powers between the legislative and judicial branches of the government;

(c) Because the Circuit Court of Appeals declared the doctrine of unclean hands to be applicable to the facts in the case at bar, contrary to the doctrine as enunciated by this Court in *Keystone Co.* v. *Excavator Co.*, 290 U. S. 240;

(d) Because the Circuit Court of Appeals declared that the plaintiff was in *particeps criminis* with those who bought his gambling devices when neither the petitioner nor his purchasers were guilty of any crime under any act of the Congress of the United States. Such a declaration of doctrine by the Circuit Court of Appeals defies fundamental precepts, to-wit: that there are no common law crimes against the United States; and that the only crimes against the United States are those created by enactments of the Congress;

(e) Because the decision and opinion of the Circuit Court of Appeals is contrary to the decision and opinion of that court in *Roseland* v. *Phister Mfg. Co.*, 125 Fed. (2d) p. 417.

CONCLUSION.

For the foregoing reasons, petitioner respectfully submits that substantial federal questions are involved in this case; that by reason thereof and the matters and things hereinabove set forth and as prayed for herein, a Writ of Certiorari should be allowed by this Honorable Court.

MYER N. ROSENGARD,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942

No.

BENJAMIN MALTZ, AN INDIVIDUAL DOING BUSINESS AS EXCEL MANUFACTURING COMPANY,

Petitioner,

vs.

GEORGE D. SAX, ET AL.,

Respondents.

BRIEF AND ARGUMENT FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions Below.

No opinion was rendered or filed by the trial judge. The order of the District Court dismissing the complaint is found in the record (Rec. p. 17).

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 134 Fed. (2) p. 2. This opinion also appears in the record (Rec. pp. 33 to 37).

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended (Title 28, U.S.C.A., Sec. 347).

The last order in the cause was the order of the Circuit Court of Appeals denying petitioner's petition for rehearing, which was entered on March 27, 1943 (Rec. p. 39). The order affirming the dismissal order of the District Court was entered in the Circuit Court of Appeals, for the Seventh Circuit, on February 26, 1943 (Rec. p. 33).

III.

Petitioner assigns as error:

(a) That the Circuit Court of Appeals erred in assuming that the manufacture, sale and distribution of the product manufactured by the plaintiff and the defendants, to-wit: gambling devices, was against the public policy of the United States.

(b) That the Circuit Court of Appeals erred in asserting that the public policy of the United States was such that the manufacturers of gambling devices are engaged in a business contrary to the public policy of the United States.

(c) That the Circuit Court of Appeals erred in declaring that the petitioner here was in *particeps criminis* either with the defendants or with those persons who purchased the product manufactured by petitioner.

(d) That the determination and opinion of the Court of Appeals is contrary to the decisions of this Court, particularly the decision and opinion in *Keystone Co.* v. *Excavator Co.*, 290 U.S. 240, 245.

(e) That the Circuit Court of Appeals erred in imposing sanctions on the plaintiff contrary to a proper interpretation of the Sherman Anti-Trust Act.

(f) That the decision of the Circuit Court of Appeals is contrary to a decision and opinion of that Court in the case of *Roseland* v. *Phister Mfg. Co.*, 125 Fed. (2d) p. 417.

IV.

ARGUMENT.

A.

The Circuit Court of Appeals has refused to accept the admonitions of this Court and has declared a public policy of the United States which imposes sanctions upon plaintiffs bringing civil proceedings for treble damages under the Sherman Anti-Trust Act, contrary to a proper interpretation of the legislative intent.

The case was brought to the United States Circuit Court of Appeals, for the Seventh Circuit, and now to this Court, based upon a record which concedes that the factual allegations of petitioner's complaint are true. Thus, the complaint (Rec. pp. 3 to 10) makes out a clear case wherein the defendants have banded and associated themselves together for the purpose of controlling the price of a manufactured product sold to dealers, jobbers and distributors throughout the United States. The record further concedes that these defendants sell in excess of 65% of the total volume of the product sold in the United States. It is further alleged and charged in the complaint that the defendants, by concerted action, engaged in a campaign to stifle plaintiff's competition by a price cutting campaign, with the intent and purpose of forcing him out of business. Therefore, the complaint presents a clear case of combination and conspiracy in violation of the express provisions of the Sherman Anti-Trust Act. (*United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 213; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 485.)

The case involving, as it does, the interpretation of an act of the Congress, requires an enunciation of legal prin-

ciples of Federal law distinguished from State law; neither the common law nor the statutory law of the State of Illinois need be followed by this Court. (*D'Oench Duhme & Co.* v. *F. D. I. C.*, 315 U. S. 447, 471; *Hinderlider* v. *La-Plata Co.*, 304 U. S. 92, 110; *Dietrick* v. *Greaney*, 309 U. S. 190, 200.)

Whether it is urged that the position taken by the Court of Appeals is in furtherance of the exercise of what might be termed "judicial prerogative" or interpolation of legislative policy, it must be conceded that the decision and opinion imposes sanctions on injured persons, not found in the act itself.

The effect of the opinion of the reviewing court is to declare a public policy which neither appears in the Sherman Anti-Trust Act itself nor in its historical object and purpose. The act itself does not declare that certain business endeavors are unlawful; nor that persons engaged therein cannot maintain civil actions for treble damages. Thus, the decision and opinion is contrary to the decision and opinion of this Court in *Frost* v. *Mines Corp.*, 312 U. S. 38.

The Circuit Court of Appeals also declares (not on the basis of *stare decisis* but as an original declaration on its part) that the articles of commerce involved herein are gambling devices. We call attention to the opinion of the Attorney General of the United States, (Vol. 22, Opinions of the Attorney General of the United States, p. 196) to the effect that these devices, until they are in the hands of the ultimate user, are not gambling devices but are machines; and that there is no gambling involved in the sale of the machine itself.

However, for the purpose of our challenge here, we proceed upon the assumption that the Court of Appeals correctly stated that the product involved herein is a gambling device.

B.

The Circuit Court of Appeals has declared it to be the common law public policy of the United States that gambling per se is against such a national policy, and, therefore, that the manufacture, sale and distribution of such devices are contrary to public policy. There is no common law public policy of the United States making unlawful the manufacture and distribution of gambling devices. The pronouncement of the Court of Appeals represents judicial fiat and defies basic constitutional precepts.

Defiant of the admonitions of this Court, suggesting that the time has come when the courts should not engage in the business of policy making in the Sherman Anti-Trust cases (*Tigner* v. *Texas,* 310 U. S. 141; *United States* v. *Cooper Corp.,* 312 U. S. 600) we respectfully submit that the reviewing court here has engaged in an interpretation which is contrary to the policy of the act. In effect, the reviewing court has declared policy.

The Federal Congress (other than in the lottery statute originally passed in 1895) has not seen fit to legislate as to gambling, in spite of the fact that both in the organic documents and by legislation gambling has been condemned in a large number of the states. The Federal Congress never at any time during its entire history sought to legislate as to the transportation of gambling devices (other than lottery) in interstate commerce. From this failure to legislate, it must be concluded that the Congress has at all times been of the opinion that the questions of gambling are matters inherently within the police power of the states, and that the states should be left each to determine its own policy.

The effect of the opinion of the Circuit Court of Appeals here is to pass judgment upon these moral issues, in spite

of the silence of the legislative branch of government, and thereby to all intents and purposes, to legislate such a public policy into existence, not only in defiance of the Federal Constitutional restraints as to the division of governmental powers, but to create, contrary to fundamental precepts, either a common law criminal law on the subject or to enforce the criminal laws of the states.

Gambling *per se* was not unlawful under the common law of England. Where gambling transactions were considered unlawful, such cases offer the exception rather than the rule. It was not until 1845 that the English Parliament attempted to pass legislation making unlawful certain phases of gambling. (See Vol. 25, English and Empire Digest, p. 396; Vol. 8, Compiled Statutes of England, 1104; *Hodgson* v. *Temple* (1913) 5 Taunt 181; *Smith* v. *Aiery* (1704) 6 Mod. 128; *DaCosta* v. *Jones* (1778) 2 Cowp. 728; *Gilbert* v. *Sykes* (1812) 16 East 150; *Morgan* v. *Pettit*, 4 Ill. 529).

If there is a federal common law of the case, then the common law of England in existence at the time of the adoption of the Constitution appears to be the starting point. (See *Smith* v. *Alabama*, 124 U. S. 465, 477-479; *Exparte Wilson*, 114 U. S. 417; *Maddox* v. *United States*, 156 U. S. 237, 243; *Standard Oil Co.* v. *United States*, 221 U. S. 1; Common Law and our Federal Jurisprudence, 74 Univ. of Pa. Law. Rev., p. 270.)

Gambling is as old as man. Throughout history, gambling laws have been flaunted and nullified by citizens as a whole. We submit that there has also been a change in legislative policy in the past twenty-five or thirty years. It will be recalled that in many states trading on recognized stock and grain exchanges was looked upon with disfavor as gambling, unlawful and as against public policy. In Illinois for many years the Supreme Court has struck down legislation which sought to legalize trading

in futures on the various exchanges. In Illinois, however, and in 1942, the Supreme Court of Illinois recognized the change in public opinion, and sustained legalizing legislation. (See *Woerter, Rec.* v. *Lamson,* 380 Ill. 35.) Then, too, horse racing and particularly betting on the result, has been treated for many years as gambling and unlawful. In Illinois, however, as well as in many other states and in the past few years, horse racing and betting have been made lawful by statutory enactments or by a recognition on the part of the courts that public opinion demands a change in the policy. (See *People* v. *Monroe,* 349 Ill. 270.) We respectfully submit that the evolutionary process tends towards a public policy which permits persons of mature years to determine as a matter of conscience as to their activities in the field of gambling.

Respondents in the first instance and the trial court and reviewing court seized upon what appears to us to be *obiter dicta* appearing in the opinion of this Court in the case of *Federal Trade Commission* v. *Keppel Bros.,* 291 U. S. 304. It is noted that this Court was very careful in stating that the case did not involve private parties and was a case involving the public and the public interest. A public agency appears as the moving party. The case involved children and the palming-off on children, by a gambling process, of inferior merchandise. It is submitted that the language used in support of the position taken by this Court was limited to the case at bar and similar cases then pending in the courts and before the Federal Trade Commission; and that it was not intended by this opinion to forevermore declare that there is a national public policy which makes all gambling transactions unlawful *per se.*

The opinion of the Court of Appeals closes the door of the courts of the United States to all civil actions where the sale of gambling devices are involved, and even to

those who might deal with manufacturers thereof with knowledge of the character of their business. Thus, there is read into all of the legislation of the Congress of the United States a proviso and exception where the Congress itself has not specifically spoken upon the subject or created any proviso or exception with reference to the subject matter. Such a decision of the court and declaration of public policy is far reaching and should not be permitted to come from the courts but should be left to that branch of the government primarily charged with the duty of declaring public policy, viz.: the legislative branch of the government.

C.

The parties to this cause are not in particeps criminis, nor does the plaintiff come into court with "unclean hands."

We submit that from a reading of the opinion of the Court of Appeals (Rec. p. 36) it would seem that the learned judge writing the opinion was not too certain about the declared doctrine of "unclean hands." He seeks to justify the decision on the basis of the doctrine of *particeps criminis* between the plaintiff and those who buy his gambling device.

It is urged here, and we urged in that court in our Petition for Rehearing, that the doctrine of *particeps criminis* cannot apply under any circumstances. There is no federal common law criminal law; this is axiomatic. There is no legislation of the Congress declaring any phase of the program to be a crime. Therefore, how is it possible for a court of the United States to say that persons who are not engaged in criminal conduct are in *particeps criminis?*

Neither can it be successfully urged that the plaintiff comes into court with "unclean hands." The parties here are dealing at arm's length; they are competitors. The

cause of action arises out of unfair competition in the competitive process—the arm's length dealing. There is not and could not be any relationship between the "unclean hands" and the relief sought. The decision of the Circuit Court of Appeals is defiant of the principles enunciated by this Court (See *Keystone Co.* v. *Excavator Co.*, 290 U. S. 240, 246). We submit that the statement of the Circuit Court of Appeals, for the Second Circuit, in the case of *Gillman* v. *Stern*, 114 Fed. (2d) 28, 32, applies here, to-wit:

> "The defense sits especially ill in the mouth of one who is himself an offender, and who seeks recrimination to continue his invasion of the other's rights and avoid restitution."

We respectfully submit that the effect of the order of the trial court, and certainly the opinion of the United States Circuit Court of Appeals for the Seventh Circuit, is to declare that the door of the courts of the United States are completely closed to civil proceedings involving this business; and to give "lip service" to a doctrine that the "law of the jungle" applies to those engaged in this type of business, and those dealing with them, and throughout the United States.

Respectfully submitted,

MYER N. ROSENGARD,
Counsel for Petitioner.

(21)

FILED
JUN 3 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 1023

BENJAMIN MALTZ, INDIVIDUALLY, DOING BUSINESS AS EXCEL MANUFACTURING COMPANY,

Petitioner,

vs.

GEORGE D. SAX, ET AL.,

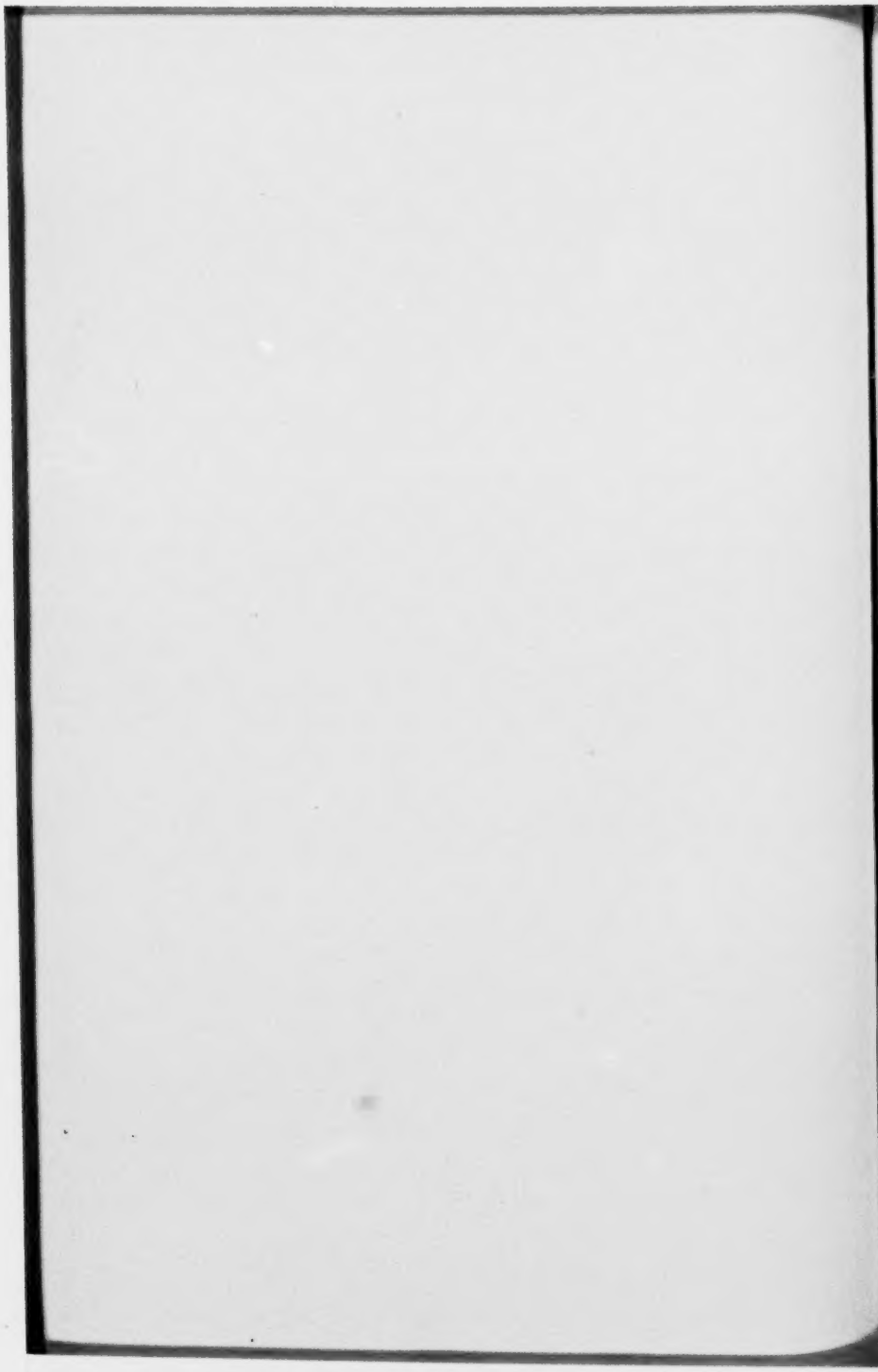
Respondents.

BRIEF AND ARGUMENT OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CLAUDE A. ROTH,
Attorney for respondents.

HARRY E. SMOOT,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO



INDEX.

Summary of Argument.

I. There is an established public policy of the United States against gambling and gambling devices. The manufacture, sale and distribution of gambling devices is contrary to that public policy..... 1

II. The Sherman Act was enacted to protect the public against evils incident to the destruction of competition and for the protection of the public welfare. The injury for which one may obtain damages under the treble damages section of the Sherman Act implies the violation of a legal right. One acquires no legal right in the conduct of a business in violation of the public policy of the country as to which damages may be recovered 4

III. The lower court properly applied the doctrine of unclean hands in determining petitioner had no right to recover; and was correct in holding that petitioner, in manufacturing, selling, and distributing gambling devices was in particeps criminis with the purchasers of his gambling devices and, therefore, not entitled to maintain his suit 5

IV. Petitioner's conduct in the manufacture, sale, and distribution of gambling devices brings him clearly within the legal maxim ex dolo malo non oritur actio, and he may not have the aid of the court in his effort to collect damages in respect of the conduct of that business 6

V. The petition does not present any special or important reason for the allowance of the writ of certiorari within the meaning of Rule 38—5 (b)..... 7

CASES AND AUTHORITIES CITED.

Ardelle, Inc. v. Federal Trade Commission, 101 F. (2d) 718 3
Bank of the United States v. Owens, 2 Pet. 527, 536.... 6, 7
Bunte Bros. v. Federal Trade Commission, 104 F. (2d) 996 3
Chicago Silk Co. v. Federal Trade Commission, 90 F. (2d) 689 3
Ewell v. Daggs, 108 U. S. 143, 149..... 6
Federal Trade Commission v. Keppel & Bro., 291 U. S. 304 1
Federal Trade Commission v. F. A. Martoccio Co., 87 F. (2d) 561 3
Harris v. Runnels, 12 How. 79..... 6
Hofeller v. Federal Trade Commission, 82 F. (2d) 647. 3
Keogh v. Chicago & North Western Ry. Co., 260 U. S. 156, 163 4
Keystone Co. v. Excavator Co., 290 U. S. 240..... 5
Morton Salt Co. v. G. S. Suppiger Co., 314 U. S. 490, 492 5
National Candy Co. v. Federal Trade Commission, 104 F. (2d) 999..... 3
Ostler Candy Co. v. Federal Trade Commission, 106 F. (2d) 962 3
Paramount Famous Lasky Corp. v. United States, 282 U. S. 43..... 4
Raladam Co. v. Federal Trade Commission, 42 F. (2d) 430, 435 2
Ramsay Co. v. Associated Billposters, 260 U. S. 501, 512 4
Stewart v. Wright, 147 Fed. 321..... 7
D. R. Wylder Mfg. Co. vs. Corn Products Ref. Co., 236 U. S. 165, 174..... 4

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 1023.

BENJAMIN MALTZ, INDIVIDUALLY, DOING BUSINESS AS EXCEL MANUFACTURING COMPANY,

Petitioner,

vs.

GEORGE D. SAX, ET AL.,

Respondents.

BRIEF AND ARGUMENT OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

The Circuit Court of Appeals Did Not Assume or Declare a Public Policy Against the Sale and Distribution of Gambling Devices, but Followed That Policy Already Established.

We rely chiefly on *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304, on writ of certiorari to the Circuit Court of Appeals, 3rd Circuit, to review a decree setting aside an order of the Federal Trade Commission forbidding certain trade practices as an unfair method of competition. The Commission found that respondent manufactured, sold, and distributed in interstate commerce package as-

sortments of candies known as "break and take" packages in competition with manufacturers selling and distributing so-called "straight goods" packages; that the use of the "break and take" package in the retail trade involved the sale and distribution of candy by lot or chance; that it was a lottery or gambling device which encouraged gambling among children, and that the sale or distribution of candy by lot or chance is against public policy. This Court found that the effects of the devices were felt throughout the penny candy industry and said (p. 309):

> "A practice so widespread and so far-reaching in its consequences is of public concern if in other respects within the purview of the statute."

Further on, the opinion says of this practice (p. 313):

> "Such devices have met with condemnation throughout the community. Without inquiry whether, as respondent contends, the criminal statutes imposing penalties on gambling, lotteries and the like, fail to reach this particular practice in most or all of the states, it is clear that the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy."

The *Keppel* case involved the Federal Trade Commission Act, not the Sherman Act, but as we understand it, the Commission came into being as an aid to the enforcement of the general governmental anti-trust and anti-monopoly policy, and that its lawful jurisdiction does not go beyond the limits of fair relationship to that policy. *Raladam Co.* v. *Federal Trade Commission,* 42 F. (2d) 430, 435.

The question in the *Keppel* case was whether or not the practice complained of was unfair. The court concluded that the practice was unfair because it employed devices, namely gambling devices, that long had been deemed contrary to public policy. The device under scrutiny in the *Keppel* case was similar in character to the device involved in this case, which is variously termed a "sales card" or "punch board." The *Keppel* case is important in that at

the time of its decision some forty pending cases were awaiting the decision, and it has been cited and followed in numerous Circuit Court of Appeals cases since the decision. It is not to be supposed that there exists a public policy against gambling and gambling devices which renders practices unfair under the Federal Trade Commission Act, but that such a policy does not exist for determining whether it is in the public interest to strike down restraints on commerce in gambling devices.

In *Hofeller* v. *Federal Trade Commission,* 82 F. (2d) 647 (7th Cir. 1936) the court said (p. 649):

> "It is quite impossible to escape the conclusion that where a competitive method employs a device whereby the amount of the return is made to depend upon chance, such method is condemned as being contrary to public policy."

In *Federal Trade Commission* v. *F. A. Martoccio Co.,* 87 F. (d) 561 (8th Cir. 1937) involving the sale of candy by a "push card," the court said (p. 564):

> "But the Keppel case seems to declare, or at least necessarily infer, that there is an injury to the consuming public through violation of the public policy opposing games of chance. * * * There is the public view and public policy against gambling and games of chance and that public policy is given full force in the Keppel Case."

In *Bunte Bros.* v. *Federal Trade Commission,* 104 F. (2d) 996 (7th Cir. 1939) it was stated that a gambling apparatus is contrary to public policy *per se* and that the use of it constitutes an unfair trade practice. To the same effect are *National Candy Co.* v. *Federal Trade Commission,* 104 F. (2d) 999 (7th Cir. 1939), *Ostler Candy Co.* v. *Federal Trade Commission,* 106 F. (2d) 962 (10th Cir. 1939), *Chicago Silk Co.* v. *Federal Trade Commission,* 90 F. (2d) 689 (7th Cir. 1937), and *Ardelle Inc.* v. *F. T. C.,* 101 F. (2d) 718, and numerous other cases.

II.

The Sherman Act Was Enacted for the Protection of the Public Welfare and to Protect Legal Rights.

The Sherman Act was enacted principally for the protection of the public welfare. In *Ramsay Co.* v. *Associated Bill Posters,* 260 U. S. 501, 512, it was said the fundamental purpose of the Act was to secure equality of opportunity and "to protect the public against evils commonly incident to destruction of competition through monopolies and its combinations in restraint of trade."

In *D. R. Wylder Mfg. Co.* v. *Corn Products Ref. Co.,* 236 U. S. 165, 174, it was said that founded upon broad conceptions of public policy the prohibitions of the Sherman Act would prevent not the mere injury to an individual "but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, * * *."

In *Paramount Famous Lasky Corp.* v. *United States,* 282 U. S. 43, the court said the Sherman Act seeks to protect the public against evils commonly incident to the unreasonable destruction of competition. Where the use of a gambling device constitutes an unfair practice within the meaning of the Federal Trade Commission Act, it could not be regarded as in the public interest to restore or increase competition in the manufacture and sale of such devices.

As stated in the opinion below, it was said by Mr. Justice Brandeis in *Keogh* v. *Chicago & North Western Ry. Co.,* 260 U. S. 156, 163, speaking of the right of action to one who has been injured in his business or property: "Injury implies violation of a legal right." The court below correctly concluded that one has no legal right to conduct a business in violation of the public policy of the

country and that no injury can be sustained in respect of conducting that business.

III.

The Circuit Court of Appeals Did Not Erroneously Apply the Doctrine of Unclean Hands, Nor Err in Regarding Petitioner in Particeps Criminins with the Purchasers of His Gambling Devices.

It is contended by petitioner that the Circuit Court of Appeals has applied the doctrine of unclean hands in violation of *Keystone Co.* v. *Excavator Co.*, 290 U. S. 240. We contend this case comes within the rule announced in the *Keystone* case. There is a clear relationship between the unclean hands and the relief sought. The claimed treble damages are based on actual damages sustained. If there are any actual damages, they are to a business carried on in violation of a public policy of the United States, which violation the Court would stamp with approval in allowing damages. Furthermore, the allowance of treble damages is one means of enforcing the Sherman Act. This kind of enforcement would result only in stimulating a violation of the public policy of the country and the increase in gambling throughout the United States. The Circuit Court of Appeals was correct in saying that *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 490, 492, announces an exception to the rule as to unclean hands stated in the *Keystone* case. There it was said it is a principle of general application that courts may appropriately withhold their aid where the plaintiff is using the right asserted contrary to the public interest. That clearly is true of plaintiff in this case, if there is a public policy against gambling in this country.

The Court below (R. 36) said that rather than deny plaintiff relief because he came into court with unclean

hands, it would be as well or better to state that he seeks damages for a business that makes him a criminal partner to gamblers and that his part is to aid a gambling business. Petitioner objects there is no basis for this statement because there is no Federal law against gambling (except certain lottery provisions). The argument of *in particeps criminis* is not shorn of its potency merely because that which is a crime in nearly every state of the Union has not been enacted into law by the Congress. The Court below was correct in concluding that plaintiff was "not entitled to judicial assistance" without regard to whether his criminal partnership arose from the violation of a state law or a federal law.

IV.

As the Circuit Court of Appeals Found, Petitioner Is Not Entitled to Aid of the Court.

Whether or not it is correct to say that petitioner by his suit has not complied with the maxim as to coming into court with unclean hands, it is clear that the legal maxim "*Ex dolo malo non oritur actio*" does apply and that petitioner under the facts of this case is not entitled to the aid of the court either in the enforcement of a claimed right under the Sherman Act or any other provision of law. This maxim has been applied by this court in many cases. *Harris* v. *Runnels,* 12 How. 79, 13 L. Ed. 901; *Bank of the United States* v. *Owens,* 2 Pet. 527, 536, 7 L. Ed. 508; *Ewell* v. *Daggs,* 108 U. S. 143, 149, 27 L. Ed. 682, 684. See also *Stewart* v. *Wright,* 147 Fed. 321.

In *Ewell* v. *Daggs,* 108 U. S. 143, 149, the court said:

> "And *Lord* Mansfield, in *Holman* v. *Johnson,* Cowp. 341, stated the ground on which, in such cases, courts proceed. He said: 'The principle of public policy is this: *Ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action

upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appear to arise *ex turpi causa,* or the transgression of a positive law of this country, then the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

In *Bank of the United States* v. *Owens,* 2 Pet. 527, 536, the court said the answer to the question whether the contracts involved were void in law

> "would seem to be plain and obvious, that no court of justice can in its nature be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country; how can they then become auxiliary to the consummation of violations of laws?"

In *Stewart* v. *Wright,* 147 Fed. 321, Circuit Judge Sanborn, dissenting at page 338, announces the rule as to *ex dolo malo non oritur actio,* and on pages 343, 346 reviews a number of United States Supreme Court decisions in regard to this maxim and says:

> "If the decisions of the Supreme Court have not been misapprehended, they evidence a uniform and established public policy of the nation to refuse to maintain in its courts any action which is founded in a plaintiff's immoral contract or act, or in his contract or act violative of a general law of public policy."

V.

The Petition Does Not Present Any Special or Important Reason for Allowance of the Writ of Certiorari As Contemplated by Rule 38-5 (b).

It does not appear that the decision is in conflict with the decision of another Circuit Court of Appeals on the same matter. The decision below has not decided an important question of local law. Petitioner has not shown that the Circuit Court of Appeals decided an important question

of federal law which has not been but should be settled by this Court; or has decided a federal question in a way probably in conflict with applicable decisions of this Court.

We respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

CLAUDE A. ROTH,
Attorney for respondents.

HARRY E. SMOOT,
Of Counsel.

End